



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

SUCCESSION CAUSE NO. 300 OF 2004

IN THE MATTER OF THE ESTATE OF LEO MAKOKHA KASIANO (DECEASED)

BETWEEN

ALI KHATA WAMUKOYA.....RESPONDENT

VERSUS

PATRICK OJWANG LEO.....1ST PETITIONER/APPLICANT

PETER ANYANGU LEO.....2ND PETITIONER/APPLICANT

RULING

1. The petitioners/applicants have filed an application dated 17th July, 2018 seeking for orders that:-

(1) The partition of L. P. No. N/Wanga/Koyonzo/1279 giving rise to L.P. Nos. N/Wanga/Koyonzo/2872 and 2873 out of a revoked grant of letters of administration issued to Ali Khata Wamukoya on 30/9/2010 be cancelled and the land do revert to the names of the deceased – LEO MAKOKHA KHASIANO.

(2) The certificate of confirmation of grant dated 19/9/2013 be amended by removal of the name of the Respondent – Ali Khata Wamukota - and it be replaced with the Petitioners/Applicants names – Patrick Ojwang Leo and Anyangu Leo as per grant of letters of administration issued to them on 22/11/2011.

2. The application is based on the grounds that:-

(1) The partition of the suit land arose out of a revoked letters of administration issued to Ali Khata Wamukoya on 30/9/2010.

(2) The orders issued to the Applicant vide letters of administration issued to Applicants dated 17/9/2013 cannot be implemented.

(3) That it is in the interest of justice that the orders sought be granted.

(4) The name of the Respondent was erroneously indicated on the certificate of confirmation of grant.

3. The application was supported by a joint affidavit of the applicants who depone that the respondent herein used a revoked grant as the basis of partition of land parcel N/Wanga/Koyonzo/1279 into No. N/Wanga/Koyonzo/2872 and 2873. That a grant of letters of administration was in this case confirmed in the names of the applicants on 17/9/2013 wherein the court ordered that they share the land equally. However that they were unable to implement the confirmed grant as the estate had already changed hands during the pendency of the succession cause. That it is in the interests of justice that the court cancels the new title deeds and revert the land parcel to the name of the deceased herein so that the applicants can effect the confirmation of grant ordered on 17/9/2013.

4. The application was opposed by the respondent through his replying affidavit sworn on the 11th August, 2019. The respondent depones that this court vide its ruling of 30/9/2010 distributed the estate herein and gave him 6 acres of the deceased's estate. That he proceeded to process his title deed out of land parcel N/Wanga/Koyonzo/1279 as shown by copy of certificate of official search marked "AK-4".

5. The respondent further deponed that his late father had purchased 9 acres of land parcel N/Wanga/Koyonzo/1279 from the deceased herein in the year 1973. However that the deceased passed away before he had effected the transfer of the 9 acres to his father. He annexed copy of

application for consent of Land Control Board and letter of consent of Land Control Board – marked “AK-2A and AK-2B”.

6. The application was canvassed by way of written submissions by the advocates for the parties. The firm of **Marisio Luchivya & Co. Advocates** represented the respondent while the firm of **Omwando Mbaka & Co. Advocates** made submissions on behalf of the applicants. The advocates for the applicants submitted that the respondent’s grant had already been revoked by this court when the respondent partitioned the subject land parcel in November, 2014. That the court had on the 17/9/2013 confirmed the grant in the names of the applicants when the respondent partitioned the land. That the grant issued by the court after confirmation dated 19/9/2013 was erroneously issued in the name of the respondent. Therefore that the said grant should be rectified to read the names of the applicants.

7. It was further submitted that this court has power to cancel title deeds by virtue of the provisions of Section 47 of the Law of Succession Act that gives the court power to make expedient orders for the ends of justice. Counsel referred to the case of **Santuzza Bilioti alia Santuzza (Deceased) –V- Giancarlo Falasconi (2014) eKLR** where on the submission that a succession court had no powers to cancel title deeds the court held that:-

“This cannot be the case as the succession court has powers to order a title deed to revert to the names of a deceased person. This in effect amounts to cancellation of the title deed if a deceased’s property is being fraudulently taken away by non-beneficiaries such as where the property is being sold before a grant is confirmed.”

8. The case of **Arthi Highway Developers –V- West End Butchery Limited & 6 Others, Civil Appeal No. 246 of 2013 (2015) eKLR** was also cited where the Court of Appeal upheld the Environment and Land Court’s decision to cancel title deeds and an order for the land to revert back to the original number on the basis that the titles were fraudulently acquired.

9. The advocates for the respondent on the other hand submitted that the application is fatally defective in that it does not cite the relevant provisions of the law under which it is made. That the partition of the subject land was obtained through a valid court order vide the ruling dated 30/9/2010. That the ruling was not challenged by way of appeal or review. That the validity of title Nos. N/Wanga/Koyonzo/2872 and 2873 can only be cancelled in the land court if proved that they were obtained fraudulently. That the application should be dismissed with costs.

Analysis and Determination –

10. I have keenly gone through the court record. It is apparently clear that the grant issued by Lenaola J. (as he then was) to the respondent dated 15th October, 2010 after his ruling of 30/9/2010 was revoked by Chitembwe J. on the 22/11/2011 after parties entered a consent to that end. The consent further indicated that the applicants herein were to be appointed as petitioners and that a new grant was to issue in their names. A fresh grant of representation was subsequently issued to the applicants. They filed an application for confirmation of grant dated 19/3/2012. The same was confirmed on 17/9/2013 wherein the court ordered for land parcel N/Wanga/Koyonzo/1279 be shared equally between the applicants. However instead of the confirmed grant being issued to the applicants, the same was on the 19/9/2013 issued in the name of the respondent though the body of the grant indicated that the beneficiaries of the subject land were the applicants. Thereafter in the year 2014 the respondent partitioned the suit land into land parcels N/Wanga/Koyonzo/2872 and 2873. He transferred part of the land to himself.

11. The respondent urges that he partitioned the land pursuant to grant issued to him which is dated 15/10/2010. He however fails to recognize the fact that the said grant was revoked vide a consent adopted in court on 22/11/2011. It was dishonest for the current advocates of the respondent to argue that the grant issued on 15/10/2010 is still valid when in fact the grant was revoked by consent of the parties. The respondent’s then advocate Mr. Elungata was present in court when the consent was entered. It is preposterous for the respondent to pretend that he is not aware of the revocation, yet he had on the 17/10/2013 filed an application challenging the revocation, which application was withdrawn on 22/1/2015. The grant dated 15/10/2010 cannot thereby have been used as the basis of the sub-division and transfer of the land.

12. The respondent filed this petition in the year 2004. He partitioned the land and processed the subject title deeds to the land in the year 2014 when this succession cause was still pending. He used a revoked grant to partition the land and to transfer part of the land to his name. It boggles the mind how the lands office allowed the registration of the land into the name of the respondent and another when the two were not named as beneficiaries in the grant dated 19/9/2013. It is quite evident that the partition of the land and subsequent processing of title deeds was fraudulent.

13. Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules grants a succession court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Such power includes cancellation of title deeds obtained through fraud or where there has been an abuse of the process of the court. The partition of the deceased’s land herein and the subsequent processing of title deeds was done through fraud. The case of *Santuzza Bilioti* cited above clearly shows that a succession court has power to cancel title deeds that have been obtained through fraud. The new title deeds processed by the respondent ought to be cancelled.

14. It is clear from the court record that the grant issued by the court dated 19/9/2013 was erroneously issued in the name of the respondent instead of being issued in the names of the applicants as per the confirmation of the grant on 17/9/2013. There was no grant at the time confirmed in the name of the respondent so as for the grant to be issued in his name. The grant is therefore for rectification.

15. The upshot is that the application herein is highly merited and is allowed. The court therefore makes the following orders:-

(1) The partition of land parcel No. N/Wanga/Koyonzo/1279 giving rise to land parcel No. N/Wanga/Koyonzo/2872 and 2873 is declared to be null and void and is hereby cancelled.

(2) The title deeds of land parcel Nos. N/Wanga/Koyonzo/2872 and N/Wanga/Koyonzo/2873 issued subsequent to the illegal sub-

division are hereby annulled and cancelled.

(3) Upon cancellation of the title deeds referred to, the land to revert back to its original reference number N/Wanga/Koyonzo/1279 in the name of Makokha S/o Kasiano.

(4) The certificate of confirmation of grant dated 19/9/2013 is hereby amended by removal of the name of the respondent, Ali Khata Wamukoya, and replaced with the names of the petitioners/applicants, Patrick Ojwang Leo and Peter Anyangu Leo as per the confirmation ordered by the court on 17/9/2013.

Orders accordingly. The respondent to bear the costs of the application.

Signed:

J. NYAGA NJAGI

JUDGE

Delivered, dated and signed at Kakamega this 28th day of October, 2020.

By:

W. M. MUSYOKA

JUDGE

In the presence of:

Mr. Ashioya for Petitioners/Applicants

No appearance for Respondent

Petitioners/Applicants – Peter Anyangu Leo/Patrick Ojwang Leo

Respondent - Absent

Court Assistant – Eric Zalo

30 days Right of Appeal.